United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
Jerome J. Niedermeier

Docket No. 76-1257

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

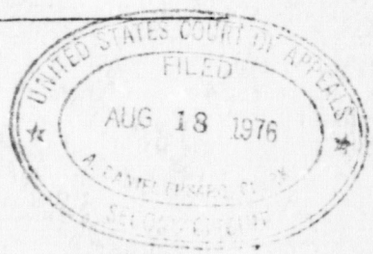
UNITED STATES OF AMERICA — Appellee

v.

ROBERT L. COMPANION — Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES



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STATEMENT OF CASE

Preliminary Statement

Appellant, Robert L. Companion, appeals the order of the United States District Court, the Honorable James S. Holden, Chief Judge for the District of Vermont, presiding. Judge Holden's order, entered on May 12, 1976, and followed by an opinion entered on May 13, 1976, denied appellant's motion to dismiss the Government's petition for revocation of probation. Further, Judge Holden ordered that appellant's probation be revoked and that he be committed to the custody of the Attorney General of the United States for the period of one year.

STATEMENT OF ISSUES

STATEMENT OF FACTS

On April 18, 1975, an indictment was filed in the United States District Court for the District of Vermont charging appellant with violating 18 U.S.C. §2314 (DA-16). On the same day appellant pleaded nolo contendere to one count of the indictment. (DA-16). On May 30, 1976, Chief Judge James S. Holden suspended imposition of sentence and placed appellant on probation for two years pursuant to 18 U.S.C. §3651. (DA-17). On December 12, 1975 Judge Holden issued a warrant for appellant's arrest for a violation of the conditions of his probation. (DA-13). On January 30, 1976, appellant was arrested near Tuscon, Arizona. (Tr.(1)-13). On February 13, 1976, after the United States District Court for the District of Arizona declined to accept jurisdiction over appellant (Tr.(2)-3,4), appellant was assigned to the Prisoner Coordination Section for transportation to the District of Vermont. (Tr.(2)-4).

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1. DA refers to Appellant's Appendix; Tr.(1) refers to the official court transcript of the May 3, 1976 hearing; Tr.(2) refers to the official transcript of the May 12, 1976 hearing.

Due to the excessive distance from Arizona to Vermont and to a manpower shortage in the United States Marshal's Office, (Tr.(2)-2, 3), there was some delay between the time appellant left Arizona and arrived in Vermont. Appellant was brought before the District Court on May 3, 1976, for a hearing on the violations of the terms of his probation.

At that hearing Donald D. Allard testified that he had been appellant's probation officer since May 30, 1975 when appellant was first placed on probation (Tr.(1)-4); that pursuant to the conditions of probation appellant (1) was prohibited from leaving the District of Vermont without permission (Tr.(1)-3), (2) was required to notify his probation officer of any change of residence (Tr.(1)-3) and (3) was to report to the probation officer as directed (Tr.(1)-3). Officer Allard also testified that he never gave appellant permission to leave the area of his probation (Tr.(1)-5); that appellant never notified him of a change of residence (Tr.(1)-5, 6); and that appellant failed to submit monthly reports (Tr.(1)-6, 7).

Appellant himself testified and admitted that he had violated the conditions of his probation (Tr.(1)-17, 18, 21).

Judge Holden found that the Government had sustained its burden of proof that appellant had violated his probation and adjourned the hearing. (Tr.(1)-28).

On May 12, 1976, the Court formally revoked appellant's probation and imposed a sentence of one year in the custody of the Attorney General with credit for time in custody since January 30, 1976 (Tr.(2)-11, 15).

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT REVOKED APPELLANT'S PROBATION.

The standard of review on appeal for probation revocation matters is whether the district court judge abused his discretion. Burns v. United States, 287 U.S. 216, 53 S. Ct. 154 (1932); United States v. Nagelberg, 413 F.2d 708, 719 (2d Cir. 1969); United States v. Markovich, 348 F.2d 238, 241 (2d Cir. 1965). Moreover it has been held that:

> 1. The degree of proof necessary for probation revocation is less than that required to sustain a criminal conviction. The district judge need only be reasonably satisfied that the terms of the probation have been violated, and the sole question on review is whether he abused his discretion in revoking probation.

United States v. D'Amato, 429 F.2d 1284, 1286 (3d Cir. 1970).

There has been no abuse of discretion in the instant case. After two hearings where appellant was present and represented by competent counsel, Judge Holden found that appellant had violated the conditions of his probation by leaving the judicial district of the court having jurisdiction over him, failing to notify the probation officer of this

district of his change in residence, and by failing to submit written monthly reports pursuant to the terms of his probation. Since appellant clearly admitted all of the aforementioned violations (Tr.(1)-17, 18), there can be no question of abuse of discretion in this case.

POINT II.

A THREE-MONTH DELAY BEFORE BRINGING APPELLANT BEFORE A JUDICIAL OFFICER DID NOT VIOLATE 18 U.S.C. §3653 OR GAGNON V. SCARPELLI.

On January 30, 1976, appellant was arrested near Tucson, Arizona for violation of probation. (Tr.(1)-13). Appellant argues that since his probation revocation hearing did not take place until May 3, 1976, the Government violated 18 U.S.C. §3653.

Section 3653 provides in pertinent part:

> As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. (Emphasis added).

The statute does not define the terms "as speedily as possible." However, there is no evidence that the transportation of the defendant from Arizona to Vermont was not as speedy as possible. As the record indicates, approximately seventeen days of the aforementioned delay was caused by negotiations for a transfer in probation jurisdiction. (Tr.(2)-3). Subsequent delays, it appears, were caused by inconvenience factors and manpower shortages of the United States Marshal's Office. (Tr.(2)-2). Further, as Judge Holden states in the opinion below: "[S]ome of the delay

is attributable to the excessive distance that the probationer traveled from this district in violation of the conditions of his probation." (DA-20).

While the Government does not condone the length of time involved in this case, the delay did not amount to an unconstitutional deprivation of rights. Initially, it should be noted that:

> . . .[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. (2)
>
> and
>
> . . .[D]ue process is flexible and calls for such procedural protections as the particular situation demands.

Morrissey v. Brewer, 408 U.S. 471, 480, 481 (1972). Clearly, the Supreme Court in Morrissey envisioned that flexible time limits were essential, especially where, as in the instant case, the probationer ". . .is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation." Morrissey v. Brewer, supra at 485.

Since the probation revocation hearing is to be held ". . .while the information is fresh and sources are available," Morrissey v. Brewer, supra at 485, the place of such a hearing is usually the place of the violation. See Gagnon v. Scarpelli,

2. While appellant makes much of the differences in the legal status between the probationer and parolee (Brief for Appellant at 13-14, United States v. Companion, Docket No. 76-1257 (D.Vt., May 13, 1976)(hereinafter cited as Brief for Appellant), the Supreme Court in Gagnon v. Scarpelli, 411 U.S. 778, 782 n.3, (1973), held that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole.

411 U.S. 778, 783 n.5 (1973). In this case the violation occurred in Vermont and the witnesses are in Vermont. Therefore, both Gagnon and Morrissey contemplate that Vermont, the locus of the violation, information and of adverse witnesses, be the place for the parole revocation hearing.

Notwithstanding the import of Morrissey and Gagnon, appellant claims that a three-month delay between the time of arrest and the revocation hearing is per se unreasonable. The Morrissey Court, however, viewed a lapse of two months as not unreasonable. Morrissey v. Brewer, supra at 488. Moreover, other courts have held that a three-month time delay would be tolerated in parole revocation cases.[3] Since there has been no showing that the delay in the instant case was purposeful or oppressive,[4] the Government would urge this Court to find that said delay did not amount to an unconstitutional deprivation of appellant's rights.

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3. See United States ex rel. Hahn v. Revis, 520 F.d 632, 638 n.5, (7th Cir. 1975); MeGee v. Warden, United States Penitentiary, 395 F.Supp. 181, 185 (M.D.Pa. 1975) (4 months not unreasonable where defendant admitted parole violation).

4. See United States v. Ewell, 383 U.S. 116 (1966).

POINT III.

APPELLANT HAS NOT BEEN PREJUDICED BY ANY ALLEGED DELAY

Assuming, arguendo, that a three-month delay between the time appellant was arrested in Arizona and when he first appeared before a judicial official in Vermont was unreasonable, appellant is not entitled to relief unless he was actually prejudiced by said delay. United States ex rel. Buono v. Kenton, 287 F.2d 534 (2d Cir. 1961); Robb v. Norton, 394 F.Supp. 856, 858 (D.Conn. 1975); Jenkins v. United States, 337 F.Supp. 1368, 1370 (D.Conn. 1972). Furthermore, whatever may have been the lawfulness of appellant's custody before his probation revocation hearing, "[T]he clear law of the [Second] Circuit is that such a hearing renders [his] custody lawful." United States v. Blassingame, 502 F.2d 1388 (2d Cir. 1974)(citing Buono, supra).

Appellant argues that the Government's actions foreclosed the possibility that he would receive a sentence of less than three months and that this constitutes prejudice.[5] Brief for Appellant at 12.

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5. It should be noted that the District Court in fact sentenced appellant for a period of one year (less time served). This event, in and of itself, moots appellants' claim of what a court might have done.

However, appellant misconceives what federal courts mean by prejudice due to delay; obviously every probationer would automatically be prejudiced if time alone were the determinative factor in probation hearings which have been delayed. Prejudice in this context refers to appellant's ability to contest the charge that he violated the terms of his probation, to present evidence of mitigating circumstances, Robb v. Norton, supra at 858, or to present witnesses in his favor. United States ex rel. Boulet v. Kenton, 271 F.Supp. 977, 978 (D.Conn. 1967). Appellant does not claim that his ability to contest the charges against him has been prejudiced. Nor does he claim that witnesses are less available now as prior to the period of delay. Appellant's argument showing mitigating circumstances --- that he violated his parole to seek treatment for alcoholism (Brief for Appellant at 2, 12) --- is not prejudiced in the least by the three-month delay. Clearly, appellant has made no judicially cognizable showing of prejudice which would warrant a reversal of the District Court's decision.

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

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United States Attorney for the
District of Vermont, Attorney
for the United States of America

JEROME J. NIEDERMEIER
Assistant United States Attorney

August 16, 1976

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
v.	)	Docket No. 76-1257
	)	
ROBERT L. COMPANION	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of August, 1976, mailed a copy of the attached Brief to Richard B. Hirst, Esq., counsel for Appellant, postage prepaid, at Villa and Hirst, 125 Church Street, Burlington, Vermont, 05401.

JEROME J. NIEDERMEIER
Assistant U.S. Attorney